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In the Supreme Court of the United States

October Term, 1973

No. 73-1124

UNITED STATES OF AMERICA,
Respondent,

v.

GEORGE I. NORMAN, JR.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 14, 1974

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The petitioner, George I. Norman Jr., respectfullly prays that a writ of certiorari issue to review the judgment and opinion of the Unied States Court of Appeals for the Tenth Circuit entered in this proceeding on October 24, 1973.

OPINION BELOW

The order of the Court of Appeals for the Tenth Circuit appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 24, 1973, and this petition for a writ of certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sections 1254 (1) and 1651 (a) and Rule 19, 1 (b), of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether a conviction lies under 18 U.S.C. Sections 2 and 656 for aiding and abetting the "willful misapplicatoin of bank funds where (a) no loss occurs to the bank where said loans are made, and (b) where there is no foreseeable loss to the bank at the time of making said loans. United States v. Docherty, 468 F.2d 989 (2d. Cir. 1972).

2. Does the failure to surrender and commence a term of imprisonment bar the constitutional right of access to, and relief from, the courts.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Section 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States Code, Title 18:

Section 656. Theft, embezzlement, or misapplication by bank officer or employee.

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank, or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both, but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

United States Code, Title 28:

Section 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective

jurisdictions and agreeable to the usages and principles of law.

Section 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Section 2255. Federal custody; remedies of motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court

shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

RULE 19

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of ap-

peals on the same matter, or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decision of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF THE CASE

Petitioner, George I. Norman, Jr., prays in his petition to this Court for review and reversal of the order of the United States Circuit Court for the Tenth Circuit denying and dismissing his petition for a writ of error coram nobis and relief from conviction.

Petitioner Norman, on March 1, 1973, petitioned the lower court for an order directing issuance of the writ and setting aside and vacating the judgment of conviction entered against him on January 22, 1971, for aiding a wilful misapplication of bank funds. The petition was denied on June 27, 1973 after presentation of petition by Norman; presentation of return by the Government; and traverse by Norman.

The ground for the petition was newly discovered evidence indicating there was no loss to the bank and newly decided law making a prerequisite to conviction a foreseeable loss to the bank.

Norman appealed but the 10th Circuit Court dismissed his appeal on the ground that Norman was a fugitive.

The prerequisites for conviction of willful misapplication of bank funds are delineated in the case of the *United States v. Docherty,* 468 F.2d 989 (2nd Cir. 1972) in which a conviction similar to appellant's was reversed. Information and facts obtained from the Federal Deposit Insurance Corporation show that there will be a gain instead of a loss from liquidating the assets of the Rocky Mountain Bank. Finally a dismissal and judgment of acquittal in a later, similar Colorado District Court case, *United States v. Karsten,* 71-CR-317 (unreported) leaves a conflict in the Colorado District between Norman and *Karsten.*

The *Docherty* decision, adopted in the 2nd Circuit, is in conflict with *Norman,* leaving a conflict between the two circuits.

Neither the *Docherty* case (which also dealt with a charge of aiding and abetting and which was not appealed by the Government) nor the information received from the F.D.I.C., nor the *Karsten* decision were available at the time of trial.

WHEREFORE, petitioner Norman, upon all proceedings on file herein and for the reasons set forth herein respectfully prays that the decision below denying his Petition be reversed; that his petition for a Writ of Error Coram Nobis be granted, that the judgment of conviction be vacated and set aside and for such other relief as may be deemed proper.[1]

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1 The Supreme Court has held that Section 1651 preserves the remedy of the writ or error **coram nobis** to correct injustices

Norman stands convicted of aiding and abetting (18 U.S.C. §2) two violations of 18 U.S.C. § 656, which prohibits the "willful misapplication" of bank funds. He comes before this Court having exhausted the remedies of direct review available to him[2] and having been denied a petition for writ of error coram nobis in the Federal District Court and the Court of Appeals for the Tenth Circuit.

Norman contends, under facts disclosed and law written after his trial, that the Government's evidence against him at trial failed to establish his commission of a crime. For verification he cites the learned and careful opinion by Chief Judge Friendly of the United States Court of Appeals for the Second Circuit. *United States v. Docherty*, 468 F.2d 989 (2nd Cir. 1972). There, Judge Friendly has confirmed the doubts

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where the statutory remedy otherwise provided by 28 U.S.C. Section 2255 is unavailable. **United States v. Morgan**, 346 U.S. 502 (1954). Here Section 2255 cannot be invoked, because Norman is not yet "in custody."
The writ of error **coram nobis** is available to challenge a conviction even though the defendant has not yet commenced the challenged sentence. **Williams v. United States**, 267 F.2d 559, 560 (10th Cir.), **cert. denied**, 361 U.S. 867 (1959). Accord: **Mathis v. United States**, 369 F.2d 43, 48 (4th Cir. 1966); **Johnson v. United States**, 344 F.2d (14) 401, 410 (5th Cir. 1965); **Woykovsky v. United States**, 309 F.2d 381, 384 (9th Cir. 1962). **cert. denied**, 374 U.S. 838 (1963); **Thomas v. United States**, 271 F.2d 500 (D.C. Cir. 1959). See generally 2 C. Wright, Federal Practice and Procedure (Criminal) Section 592, at 587 (1969).
In addition, Rule 57(b) of the Federal Rules of Criminal Procedure provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with this rule or with any applicable statute." See **In re Stern**, 235 F. Supp. 680, 682 n. 10 (S.D.N.Y. 1963) (Weinfeld, J.).

2 The Court of Appeals affirmed the judgment of conviction herein on July 12, 1972, and denied a timely petition for rehearing on August 25, 1972. The Supreme Court denied a timely petition for a writ of certiorari on January 8, 1973, and a petition for rehearing on February 26, 1973. The trial court denied and dismissed the petition for writ of error coram nobis on June 27, 1973. This appeal was dismissed on October 24th for failure to surrender this petition follows:

that the Court itself expressed during Norman's trial as to reach an application of the statute under which he was charged. And Judge Friendly has clearly relegated to its own facts *United States v. Fortunato*, 402 F.2d 79 (2nd Cir. 1968) a past decision of his own court, on which the Government persuaded the *Norman* trial Court to rely.

On facts more favorable to the Government than those adduced against Norman here, the Court of Appeals for the Second Circuit reversed a conviction for aiding and abetting a violation of § 656, and directed the dismissal of the indictment.

The Colorado District Court dismissed a later case *United States v. Karsten*, 71-CR-317, rendering a judgment of acquittal on January 14, 1972 holding that there was no evidence that the borrower, who had obtained the loans for the benefit of bank officers, did not have the ability to repay or were fictitious. The reasoning of Judge Chilson is evident from this trial transcript excerpt:

> "So Mr. Miers was not a fictitious person nor was he a "straw man" in the bad sense of that term as being a non-entity or somebody who was without substance. He was a man of financial substance and, according to the evidence, his financial condition would justify a loan by a financial institution . . . "
>
> "The fact that a bank officer or director borrows money from someone who is indebted to the bank or is about to become indebted to the bank, or may become indebted to the bank in the future, is not prohibited nor is it a misapplication of funds—well, instead of putting it that way, it doesn't amount to a borrowing from the bank or

> a bank officer to borow from a borrower from the bank." (Tr. 41 and 42).

Throughout the course of the petitioner's trial, the Court questioned the applicability of § 656 to the offenses charged by the Government. Thus, when the petitioner moved for a directed verdict at the close of the Government's case, the Court indicated its concern as to the nature of the Government's proof. In response to the presentation of the prosecutor, the Court inquired:

> If they (the borrowers) were solvent or if there was collateral to support the loan, what is defrauding about who the money goes to? (Tr. 1918)[3]

Earlier, the Court had stated:

> Well, they don't have to be bona fide loans under this statute if the maker of the loan is a real person or a real corporation and the security is adequate, or the financial standing of the person adequate. How is that defrauding the bank? You see, with intent to defraud the bank. Now the fact that — I just don't understand the theory of your claim. This is so different than the Brighton Bank case where they used fictitious people and forged notes and so forth. We don't have that in this case at all. (Tr. 1620).

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3 "Tr.)) refers to the transcript of the trial proceedings.
At 994, pointing out the criteria which tipped the scales to sustain indictments in cited cases, the **Docherty** Court required:
—the maker had no intention to repay—
—a maker he knew to be insolvent—
—a check he knew was back by insufficient funds—
—when a bank officer loaned money without security knowing that the borrower could not repay—
—when a depositor repeatedly overdrew his account—
—leaving his own bank only with a personal note which he
—had no reason to think would be paid—
—issued on strength of fraudulent loan application—
Then it contrasted this:
The (Johnson) court found the indictment flawed since there was no allegation that the maker was known to be insolvent or to have an intention not to repay.

> Well, there is a body of law to the effect . . . that where an officer or director of a bank makes a loan to his own benefit without disclosing his interest, then that is a wilful misapplication. (Tr. 1620).

The far reaching implications of *Fortunato* were severely limited by *Docherty*.

If the Norman court had sat after *Docherty* and Karsten it would not have convicted Norman.

Later in the Norman trial, at the conference with counsel preceding the instructions to the jury, the lower Court again expressed its concern as to the reach of § 656 and its uncertainty that a crime had been proved. The Court remarked:

> I have never had an embezzlement case or a misapplication case like that, I admit that, like this one. I am not positive that these people are even charged properly. I think they are sufficiently enough that I have gone this far, but I am not absolutely sure about this. It is a most unusual situation, *because the evidence at this point hasn't established even a loss, really. They are still liquidating, I guess, and it may not be any kind of a loss,* and it may be that the higher court will look at this as not the proper charge to be made for this type of thing. I don't know about that. I don't find anything in the books just like it . . . Tr. 2349-50) (emphasis added)

Since this occurred after all of the evidence was in, it is obvious that the Court felt that no evidence of a loss had ever been shown.[4] Norman suggests that the

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4 Norman does not contend that it is always incumbent upon the government to prove an actual loss. Yet, as shown by Judge Friendly, the probability of a loss and a conversion of the bank's funds are essential elements of the crime.

last sentence of the remark demonstrates that if *Docherty* had then been "in the books," the charges against Norman would have been dismissed as they were were in *Karsten*.

Instead the Court relying upon language[5] of *United States v. Fortunato, supra*, allowed the case to go to the jury.

Counsel for Norman repeatedly urged the Court to reject the *Fortunato* precedent; contending that the facts of the case rendered it inapplicable as precedent in the present matter. Nonetheless, at the instance of the government, the Court charged the jury in the language of *Fortunato*. Under *Docherty* a directed verdict would have been proper.

The Second Circuit's decision in *Docherty* squarely conflicts with the reasoning of this Court in affirming Norman's conviction and separates that factual situation from the precedent on which this Court relied. The essence of the Government's case against Norman was that he had used a nominee to draw down one loan and a new corporation to draw down another. There was no dispute that the parties in whose name the loans were taken were fully competent to repay them.

In *Docherty*, the defendant had borrowed money from a Buffalo bank at the behest and for the benefit of Evans, an old friend and one of the bank's officers.[6]

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5 In Docherty, Judge Friendly points out the pit-falls in not relating language to the facts of the case. He states: "If the statement in that opinion (Lanelli) were to be read alone and out of context, it would require affirmance here. But that is not the way to read an opinion—or anything else. A statement in an opinion must be read in the light of the facts and contentions to which it is addressed."

6 The evidence indicated that through these and other loans, Evans had embezzled about $300,000.

When Docherty asked why Evans did not simply borrow the money himself, he was informed that bank policy prohibited Evans' borrowing from his own bank. Thus, Docherty was put on actual notice that Evans was acting in violation of bank rules.

Docherty, like Norman, was charged with aiding and abetting several substantive violations of § 656.

Judge Friendly distinguished *United States v. Fortunato* as being among these cases " . . . where courts of appeals have upheld convictions for wilful misapplication (which) have involved a considerably greater degree of inequity or foreseeable loss than anything which Docherty knew." (P. 994).

The operative test, as set forth by Judge Friendly:

> "When a defendant is charged simply as an aider or abettor, submission to the jury is warranted only if there is enough evidence to show that he knew of such activity of the principal" here the statutory offense set forth in §656 and desired to forward it . . . "(P. 992)

"Our summary alone," said Judge Friendly, "demonstrates the insufficiency of the evidence to show knowledge on Docherty's part that Evans intended to embezzle, abstract or purloin money, funds or credits of (the bank.)" (id.). He continued:

> " . . . to support a conviction for aiding and abetting in a 'wilful misapplication', the alleged aider or abettor must have knowledge that the officer intended to effect a conversion.
>
> "Here there was clearly no sufficient evidence of intent to 'injure' the bank. Docherty knew he was putting his own credit on the line, and it is not suggested that he lacked the means to

> repay (citation omitted). As to defrauding, even if we assume arguendo that failure to disclose the true recipient of the proceeds was a misrepresentation, the case lacks the element of foreseeability of damages essential even for a civil suit (citations omitted). Indeed, there will be no damages at all from the transaction in which Docherty took part, if, so far as the record shows, the notes are collectible . . . Finally, there was no intent to deceive a bank officer or examiner. Docherty's failure to disclose the true recipient of the proceeds of the loan cannot be considered a deceit when . . . he made no false statement of his purpose for the loan." (P. 994,4).

Each of the elements enumerated by Judge Friendly is abundantly present in Norman's case. First, the borrowers on both loans in question knew they were putting their own credit on the line. Norman's accountant so testified.[7] And the company whose office-building asset fully secured the second loan caused all its shares to be pledged at the bank as security for the loan. There is no suggestion that either Norman, his nominee or the corporation lacked the means to repay the loans.

Second, even assuming—as the Second Circuit was willing to do in Docherty's case—that Norman is chargeable with a failure to disclose the final recipient of the proceeds of one loan, there is no evidence whatever to make out the element—required by the Second Circuit—of foreseeability of damages essential for even a civil suit. To the contrary, the office-building income more than sufficed to meet the monthly payments on both loans. At the trial this Court properly ruled that any loss on the other loan could not be attributable to

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7 In addition Norman gave the accountant his personal guarantee.

either Norman or his accountant.[8] Moreover, information recently received from the Federal Deposit Insurance Corporation establishes beyond any question that The Rocky Mountain Bank has sustained no loss whatever as a result of the transactions complained of by the Government, and particularly those as to which Norman was charged.[9]

Finally, the record is devoid of evidence that Norman intended to or did deceive any bank officer, director or examiner.

Dissenting in *Docherty,* Judge Lumbard urged that the Second Circuit's decision could not be reconciled with its earlier ruling in *United States v. Fortunato,* 402 F.2d 79 (2nd Cir. 1968) (P. 992)—the very ruling on which this Court and the Tenth Circuit Court of Appeals, relied in upholding Norman's conviction.

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8 Payments on that loan were being regularly made until it was criticized as an "out of state" loan and sold by the bank. The government's own witness, Agent Glover, testified that the Wangsgard loan was paid. (Tr. 1495). This court in making its ruling said, (Tr. 649-50):

"So once the funds are taken from the bank and you can show the disposition of those funds, why, then the case is closed as far as those particular individuals involved are concerned."

"Yes. You can't hold Mr. Salazar—and I am just using this as an example, because I don't know what the evidence will show—you can't hold him responsible for anything in connection with the Wright loan unless he has some connection with it. That may be somebody else."

9 That evidence consists of two letters, dated January 23, 1973 from the F.D.I.C., app. shows that even after deducting $321,000.00 in liquidation expense, all but $61,000.00 has been recouped. Yet, the F.D.I.C. still has 324 unliquidated assets, including the Lakewood Medical Center, which has a value of over $500,000.00. Rather than a loss, the F.D.I.C. and ultimately the shareholders of the bank will receive a substantial profit. The second letter establishes that the Lakewood Medical Center is reasonably valued at the above amount, that it is making a profit for the F.D.I.C., (as the bank's successor) and that increased income can be expected. This is on top of the premium paid for the deposit assets. Thus, Norman is faced with the anomalous position of being sent to prison for allegedly assisting to defraud the bank by a transaction which will result in a significant profit to the bank. (R. 13-16).

The Tenth Circuit on Norman's appeal did not have the opportunity to take account of the *Docherty* or *Karsten* cases, or to consider Judge Friendly's curtailment of *United States v. Fortunato,* and its imprecise language, upon which the conviction of Norman was based (and sustained). Norman respectfully suggests to the Court that if such decisions had appeared prior to its decision, that Court would not have sustained his conviction for aiding and abetting a violation of § 656, *Docherty* was brought to the attention of the United States Supreme Court in a supplemental petition and petition for rehearing. However, the mere fact of the Supreme Court's denial of certiorari imports no expression of opinion on the merits of the case.[10] The sheer impossibility of it hearing more than a very small percentage of the cases presented to it would alone account for this result. Moreover, the Government did not appeal the *Docherty* case, leaving a direct conflict between the two circuits which should have been met directly.

Norman suggests that in view of the conflict reflected not only between the circuits but between decisions rendered in the Colorado District Court, this Court should resolve the conflict by following the *Docherty* decision.

Summarizing and comparing *Norman* with *Docherty,* Norman is a stronger case on its facts, in at least five particulars, than was *Docherty.* These particulars are as follows:

(a) Docherty knew at the time he gave the proceeds of the loan to Evans, the banker, that he was

10 See, e.g., **Agoston v. Pennsylvania, 340 U.S. 844 (1950).**

circumventing the banking laws because Evans told him so. In contrast, there is nothing to show that Norman had any knowledge that his acts would be construed as illegal. The loans were legitimate and, because of more than sufficient security and/or collateral, should have withstood any bank examiner's scrutiny.

(b) In the *Docherty* case, there was actual fraud and embezzlement by Evans, which was unknown to Docherty. Here, there was no fraud, intent to defraud or embezzlement. The charge, in counts 8 and 9, were misapplication of "bank funds" which, under the *Docherty's* doctrine, are really "borrowers funds."

(c) Although Judge Friendly, in *Docherty,* assumed sufficient collateral because this point apparently was not raised by the Government, Norman was convicted in this case where the one loan was backed by a balance sheet three times the value of the loan, and the other loan was backed by a corporation's assets *which clearly were able to, and did service the debts of both loans.* The Norman situation is proven where *Docherty* was merely assumed.

(d) In Docherty, the alleged aider and abettor not only knew he was cooperating in the circumvention of the banking law, but went so far as to give the banker the payment books and requested the banker pay off the loans. Here, the evidence shows that the Coopers never had direct access to any moneys. Since the loan moneys were disbursed by the bank to the obligated debtors, and since the loan was fully secured, with no demonstrated intent not to repay, the loan money ceased at that point to be "bank runds" and became instead borrowers funds". Under the *Docherty* doctrine, the

link was severed and further disposition of the "borrowers funds" could not be branded criminal even if the recipients were officers or directors of the same bank.

(e) In the *Docherty* case, the banker got the loan proceeds directly from Docherty. In the *Norman* case the bankers never personally received any loan proceeds.

There is no doubt that the Norman conviction was based on statements referring to concealment in the *Fortunato* case, and there is no question that the *Docherty* case correctly limits the *Fortunato* case to its facts and those facts do not encompass the conduct of which Norman stands convicted.

The Government has made the statement that the bank had lost $60,000.00 on the Wangsgard loan at the time of the trial. This so-called evidence was expressly ruled inadmissible as to Norman by the trial judge. The reason for the trial court's ruling was sound —the subsequent Wright transaction occurred one and a half years after Norman's contact with the transaction. The trial court properly ruled that because of remoteness of intervening occurrences and the absence of any connective link to Norman, such evidence could not be used against him. The Court expressly excluded the testimony of a government witness as against Norman on this score (Tr. 519)—a ruling corroborated days later (Tr. 1214). And it excluded as against Norman the documentary exhibits upon which the Government based this allegation (Tr. 655, 1214). As the Court put it, "(O)nce the funds are taken from the bank and you can show the disposition of those funds, why

then the case is closed as far as those particular individuals involved are concerned." (Tr. 649).

2. DOES THE FAILURE TO SURRENDER AND COMMENCE A TERM OF IMPRISONMENT BAR THE CONSTITUTIONAL RIGHT OF ACCESS TO AND RELIEF FROM THE THE COURTS?

Implicit in the order of the Court of Appeals of October 4, 1973 is the notion that unless Norman submits himself to the jurisdiction of the court within fifteen days he is thereby deprived of his right to have that court consider the petition for the writ coram nobis on its merits.

The Court of Appeals disposed of petitioner's application for a writ of error coram nobis on the motion of the United States Attorney which was based on the theory that Norman was not entitled to have his petition considered unless he submitted to the jurisdiction of the court.

The case of *Heflin v. United States,* 358 U.S. 415, 79 S. Ct. 451 (1959), held that where petitioner appealed a sentencing claimed to be defective, and where the Government claimed that petitioner could not contest his sentence, that he could obtain relief even though he was not in custody under the sentence complained of.

Alfred J. Arraj, Chief Judge, United States District Court for the District of Colorado, in his order filed June 27, 1973, involving this petitioner, states:

> "Although it is if no significance in the ultimate determination of the defendant's petition for

> the writ, it is here noted that the defendant did not fully comply with the mandate to surrender and since March 12, 1973, has been and presently is a fugitive."

And to similar effect is *United States v. Morgan,* 39 F.R.D. 323 (1966) U.S.D.C., N.D. Miss.

> "Unlike a Section 2255 motion or an application for a writ of habeas corpus, the presence or absence of custody under the challenged sentence is not material in determining the court's jurisdiction to issue a writ of error coram nobis although that element may have bearing on the merits of the calim for relief."

REASONS FOR GRANTING THE WRIT

Under the facts of the *Fortunato* case and under the holding of *Docherty* there was no evidence in this case that Norman had any intent whatever to injure or to defraud the bank or make any concealments which could possibly tend to have that effect. Neither *Docherty* nor Norman would be subject to civil suit for conversion, as suggested in *Docherty,* because of the adequate security and collateral backing up the loans. A re-evaluation of the *Fortunato* case in the light of the limitations of the *Docherty* case would require reversal of petitioner's conviction, or an order directing that a writ of error coram nobis be granted, notwithstanding his absence from the jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Tenth Circuit.

Respectfully submitted,

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